

MINUTES

**MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON BUSINESS AND LABOR

Call to Order: By **CHAIRMAN DALE MAHLUM**, on February 14, 2003 at 9:01 A.M., in Room 422 Capitol.

ROLL CALL

Members Present:

Sen. Dale Mahlum, Chairman (R)
Sen. Mike Sprague, Vice Chairman (R)
Sen. Sherm Anderson (R)
Sen. Vicki Cocchiarella (D)
Sen. Kelly Gebhardt (R)
Sen. Ken (Kim) Hansen (D)
Sen. Sam Kitzenberg (R)
Sen. Glenn Roush (D)
Sen. Don Ryan (D)
Sen. Carolyn Squires (D)

Members Excused: Sen. Bob Keenan (R)
Sen. Fred Thomas (R)

Members Absent: None.

Staff Present: Sherrie Handel, Committee Secretary
Eddie McClure, Legislative Branch

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: SB 337, 2/5/2003; SB 331, 2/5/2003
Executive Action: SB 235

{Tape: 1; Side: A}

HEARING ON SB 337

Sponsor: **SENATOR JOE TROPILA, SD 24, NORTHWEST CASCADE COUNTY**

Proponents: **Mark Staples, Montana Tavern Association; Bill Johnston, Montana University System; Ralph Ferraro, Rocking R Bar in Bozeman; Jim McHugh, social host/event producer; Amy Sullivan, Montana Tourism Coalition; Kristi Blazer, Montana Beer and Wine Wholesalers Association; Glenn Mortenson, Town Tavern, Great Falls; John Hayes, Talbot Insurance Agency; Stuart Doggett, Montana Innkeepers Association; Jacqueline Lenmark, American Insurance Association; Aidan Myhre, Montana Chamber of Commerce; Bob Fletcher, Cannery Lodge and Liquor Barn**

Opponents: **Al Smith, Montana Trial Lawyers Association**

Opening Statement by Sponsor:

SENATOR JOE TROPILA, SD 24, NORTHWEST CASCADE COUNTY, brought before the committee an act revising the civil liability of businesses and social hosts for injuries involving alcohol consumption. **SEN. TROPILA** commented that he and his family have been in the liquor business for many years. Due to a growing number of things happening in the business that he was attempting to amend. SB 337 is a bill about responsibility. It professes an alcohol licensee's and social host's responsibility to the public and also the responsibility of adult customers and guests for their own behavior. It is also about juries and trials and being able to look at all factors in damage for injury cases and consider the behavior of both the host and the guest in assessing responsibility. Finally, it is about the timeliness of making a claim against someone so that recollections are reasonably intact and witnesses are still available. It's about rational limits to economic punishment beyond what is owed for real damages. "Dram Shop" is an old English term for a place where alcohol is served. For years, Dram Shops or bars were not liable under the law for the actions of their customers once they left the premises nor were social hosts liable for the actions of their guests once they left their property. Gradually, many courts, not legislatures, established so-called Dram Shop liability and social host liability so that licensees and hosts were held responsible for the actions of their patrons and guests, and persons injured by that patron or guest could sue the licensee or host for their damages. Though a number of states including

California, Georgia, and South Dakota have now gone back to the previous law where the bar or social host is not responsible for the drinker's actions, SB 337 does not go that far. It preserves the right of the innocent third party to sue the bar or social host, but it also states, as more states are now doing, that the drinker, be it a customer or a guest, can't sue the bar or host unless he or she was coerced into the drinking or he or she was a minor and the bar or host knew it or should have known it. And, with SB 337, the jury can look at the actions of the drinker after leaving the bar or the social event and may (not must) determine that the behavior was unforeseeable and that behavior, not the bar or social host, was the proximate cause of the third party's injury. This is patterned after Colorado law, and there are similar statutes in Idaho, Arizona, Georgia, Kentucky, Missouri, South Dakota, and even California, which we all know is not exactly conservative. These laws have been upheld in those states, even by California's Supreme Court, which he again reminded the committee is hardly conservative. The two-year statute of limitations proposed in SB 337 gives plenty of time for plaintiffs to determine that they have been injured and find out where the person causing the accident was drinking. But it isn't so long a period that those accused are handicapped in trying to present a case with witnesses long gone or with memories eroded. Again, he said this is reasonable compared to other states. Of the 23 states with specific provisions for statute of limitations in their Dram Shop law, two are less than a year, three have one year statutes of limitations, 13 have the two year limitation the same he was proposing and four states have three year statutes of limitations. Finally, **SEN. TROPILA** said, this bill does not limit in any way actual damages that an innocent party may have. Many states have limited those damages, but this bill doesn't. What it does is set a reasonable ceiling on non-economic damages, such as punitive. That cap would be \$250K, which ought to be enough to send any small Montana business a message. Three letters from proponents not present at the hearing were submitted by **SEN. TROPILA**: John R. Tooke, C.P.A., of Miles City, **EXHIBIT (bus33a01)**, Rick Flotkoetter, Texas Club owner in Miles City, **EXHIBIT (bus33a02)**, and Scott Tuxbury of Big Sky Underwriters, **EXHIBIT (bus33a03)**. **SEN. TROPILA** asked for the right to close.

Proponents' Testimony:

Mark Staples, Montana Tavern Association, discussed the balance necessary for the law to be fair and how the pendulum has swung too far in this area. He stated that **SEN. TROPILA'S** bill brings the pendulum back to the middle. **Mr. Staples** felt a good history had been given on other states and how they have handled this issue. The law of the land for years was that a person was

responsible for himself. That concept changed over the years by the courts in this country, but it is changing back in a number of jurisdictions. No matter how unforeseeable or bizarre the behavior of the drinking patron or unrelated to the actual serving of the drink in a bar, the law of Montana is now that because the bar has committed the misdemeanor crime of serving the visibly intoxicated patron, nothing else matters. That bar is responsible for anything that emanated from that action. A number of courts, including California, Idaho, Hawaii and others, have said the bar responsible at all. It's that person's fault. This bill doesn't go that far. It leaves the innocent third-party victim perfectly entitled to sue the bar or tavern, but the drinker can't unless he was coerced and that would be a jury decision or it was a minor and the bar should have known it was a minor. The innocent victims are kept in the loop, and all of their rights are preserved. On the other hand, **Mr. Staples** stated the drinker can't sue the bar unless coerced or a minor. The jury can, but doesn't have to, look at both the bar's behavior and the drinker's behavior. Then the jury can determine the approximate cause of the accident. **Mr. Staples** discussed how the process in these cases is to file a claim just a few days before the statute of limitation runs out, let the drunk person off cheaply, and then go after the bar owner. He said the bar owner has a whale of a time trying to reconstruct the facts. The servers are gone; the witnesses are gone. This bill asks for a two-year statute of limitations, which is still more than other states have on their books. Two years is not unreasonable. It gives both sides the opportunity to put their case together. **Mr. Staples** commented on the fact that a cap would be put, in this bill, on punitive damages only. While the bill would not allow unlimited punitive damages, it limits them and still sends a message to everyone not to do it again. Also, these cases can't even start unless the bar or social host coerces the visibly intoxicated to drink more or serves a minor.

Bill Johnston, Montana University System, said they support this bill for their foundation, alumni association and sports booster clubs. They are social hosts and feel it in their best interests to support the bill.

Ralph Ferraro, Rocking R Bar in Bozeman, shared that he has been through one of these lawsuits and it made it so cost prohibitive for him to purchase liquor liability insurance at all that he can't afford it and it has put a burden on him. After the lawsuit, it put such a heavy financial burden on him and his family, he almost sold the bar. He felt he was a target to the public. He said he would appreciate the committee considering this bill, because it's a good one.

Jim McHugh, social host and event producer, commented on skyrocketing prices for liquor liability insurance and that it is harder to continue producing their events. The events he produces are key fund raising tools for many programs. He offered his strong support of the bill.

Amy Sullivan, Montana Tourism Coalition, supported the legislation.

Kristi Blazer, Montana Beer and Wine Wholesalers Association, shared that, as a lawyer, she has represented both plaintiffs and defendants in dram shop cases and has watched this area of law develop. It started out as a judicial cause of action. The courts made the exception. This bill would put this issue back to where the law began. The law as it stands states the person doing the drinking and damage bears no responsibility. This bill also fits in with the wholesalers' platform of responsible consumption of their products and statement that individuals should not drive drunk and if you do, you should not be rewarded by being allowed to sue the host. On behalf of the association, she expressed their belief that SB 337 is a good bill and should be passed.

Glenn Mortenson, Town Tavern owner in Great Falls, shared his situation. In 1993, a car drove through his bar. It injured a person in the bar. The person who drove the car had been wheeled into the bar in a wheelchair by his sisters. He had been lifted out of the wheelchair and placed on a barstool and they had a pitcher of beer. After that, he was placed back in the wheelchair and into the bathroom by his sisters. They left him there, so someone else wheeled him out. He was again lifted out of the wheelchair and placed on the stool. At that point, he was mad and verbally abusive, so his sisters decided they wanted to go. They lifted him back off of the barstool and placed him in the wheelchair. They wheeled him out to the car and put him in the passenger side of the car. The sister's niece was the designated driver, but she decided she did not want to drive him home. She headed off down the street. He somehow pulled himself over on the driver's side of the car, started the car up, went through the wall of the bar, and injured a person inside the bar. One year later, in 1994, he pleaded guilty to two counts of intentional criminal negligence, meaning he meant to do what he did. He was sentenced to 20 years in prison. In 1996, **Mr. Mortenson** was served notice he was being sued by the person that was injured in the bar. Witnesses had moved or left the area. The discovery period was set up for 1997. He was unable to find a lot of the people who were "players" in the case. He said he had filed a third-party lawsuit, and the sisters had been bought off for ten bucks by the plaintiffs, so he could not approach

them. The daughter that was supposed to be the designated driver had supposedly gotten married and he could not locate her. The officer who took the statements the night this happened (nowhere in the statements was intoxication mentioned) had left the police force. He was told the officer had moved to New York; however, **Mr. Mortenson** could not locate him. When they went to trial in 1998, it could not be mentioned in front of the jury that this man had pleaded guilty to two counts of intentional criminal negligence. He was in a prison in Tennessee. The whole result was that he was in a court battle with his hands tied. They couldn't put on a case. They lost. The judgment was awarded to the plaintiff against **Mr. Mortenson** for \$750K. He said that pretty much took him to his knees. He is trying to survive. He filed a Chapter 11 bankruptcy to try and preserve what sort of estate he had. That bankruptcy hindered his wife, who is in the insurance and securities business in getting her securities license. They got out of the Chapter 11 because all of his other bills were current, but he has this huge cloud hanging over him. He is continuing to pay on this judgment. He said his credit rating is shot because of the Chapter 11 filing. He's not sure how long he can survive this situation. SB 337 could have helped him greatly back then by allowing him to introduce all of the evidence. While it's too late for **Mr. Mortenson** now, it might help some other bar owners.

{Tape: 1; Side: B}

John Hayes, Talbot Insurance Agency, said he has been insuring bar owners and those in the entertainment industry for ten years. The average life of insurance companies doing business with bars and the entertainment industry in Montana is about a year and a half due to the laws. They experience claims in this arena and they're gone. Five years ago, approximately 12 companies were available in this field to sell insurance to bars; today, there are three. They're gone. During the past three years, he has written liquor liability policies totaling \$982K in premiums. In the last six months, he has paid a total of \$750K, which doesn't count any of the claims in the previous 2 1/2 years. He said they are upside down as far as the insurance carrier goes for the liquor liability. The first response by insurance companies is to leave the state. Then they talk about a 100 percent increase in premiums. He encouraged the committee to vote favorably on SD 337.

Stuart Doggett, Montana Innkeepers Association, said many of their members are full-service properties that have bars, restaurants or lounges in their facilities. They're appreciative of this common-sense bill and urged the committee to pass it.

Jacqueline Lenmark, American Insurance Association, commented on the excellent testimony already given on SB 337. They feel it is a balanced, common sense approach to the problem. She strongly urged the committee to give a DO PASS recommendation to it.

Aidan Myhre, Montana Chamber of Commerce, also rose in support of the bill. They thought it was a reasonable approach and places the liability where it belongs. It affects about 700 Montana businesses, who are very concerned about liability issues.

Bob Fletcher, Cannery Lounge and Burger Bob's in Bozeman, clarified the definition of liquor liability. He has not been able to carry liquor liability insurance for the past 15 years, because it would cost \$15K per year to do so. He urged the committee to support the bill, because the small, independent businessmen need some help.

Opponents' Testimony:

Al Smith, Montana Trial Lawyers Association, listed reasons why his organization opposes the bill. He said the liquor business is a risky business. He went through each item of the bill and explained why those involved in serving alcohol should not be treated differently than other businesses in Montana and quoted from the Montana constitution with regard to the rights of individuals.

{Tape: 2; Side: A}

Mr. Smith discussed **Mr. Mortenson's** case and the fact that the committee was being asked to make a decision affecting all of Montana like the one made by a judge and jury after hours and hours of testimony. He also stated he doesn't think this issue is as black and white as it had been portrayed to the committee members.

Questions from Committee Members and Responses:

SEN. DON RYAN questioned **Mr. Staples** about the coercion and constitutional issues brought up by **Mr. Smith**. **Mr. Staples** answered he felt it strange that **Mr. Smith** would say juries should decide on the monetary compensation, but they shouldn't decide who is responsible. Plaintiffs and their attorneys know they are going to sue; business doesn't. If the statute of limitations continued to be set at three years, **Mr. Staples** suggested putting an 180-day notice provision in the law, which means the business could begin notifying and searching for witnesses and preparing for a possible trial. A jury should be able to decide if a bar patron was coerced into drinking. As far

as punitive damages go, it's a message. He questioned why it would take \$10M in punitive damages to send a message.

Ms. Lenmark was asked by **SEN. MIKE SPRAGUE** if there is a direct correlation between rates and competition. She replied there would be a definite effect on insurability with this bill.

SEN. SPRAGUE went on to ask **Mr. Smith** about the burden of proof with the .08 or .10 level of intoxication. As far as this bill is concerned, the blood alcohol level is not allowed as evidence.

Mr. Staples was then questioned by **SEN. SPRAGUE** about the coercion as opposed to induced and asked for a legal definition. **Mr. Staples** explained that coercion is already in the statute. Happy Hour is to get them there; coercion is forcing them to drink.

SEN. VICKI COCCHIARELLA referred her question to **Bob Pavlovich, former House Representative and tavern owner from Butte**. Within the last year, there were two gentlemen drinking in the bar he used to own. One fellow came in, walked up to the other fellow, punched him and knocked him off of the stool. The gentleman who was punched decided he was going to sue the bar, because the bar served drinks to the gentleman who punched him. **Mr. Pavlovich's** former partner (owner of the bar) and the two bartenders present at the bar that night stated they did not serve the puncher any drinks that night. It came down to his word against theirs. They went to court to settle the issue, and the two fellows who fought walked out of the courtroom as buddies, which led **Mr. Pavlovich** to question whether or not this was a set up.

Mr. Staples was asked by **SEN. COCCHIARELLA** to go into the non-economic liability issue of the bill a little further when pain is addressed and what it means. **Mr. Staples** said actual damages include hospital and doctor, therapy, lost wages and so on. His example was a scar on the face of a previously attractive person as being damages which go beyond the actual damage payments.

SEN. COCCHIARELLA wanted to know the difference between punitive and exemplary damages. **Mr. Staples** referred the question to **Mr. Smith**, who said in Montana, punitive and exemplary damages are the same thing.

SEN. COCCHIARELLA asked **Ms. Lenmark** to comment on the same question. She said in Montana, there is a statute that defines punitive damages and exemplary damages as the same thing and either term can be used. She felt **Mr. Smith** was correct when he commented that this language was borrowed from another jurisdiction. She suggested an improvement to the bill would be to clarify those terms. She thought the intent was to limit non-

economic damages to \$250K and the punitive or exemplary damages to \$250K. The other aspect of the non-economic damage portion of the bill she would dispute with **Mr. Smith** was about the examples of the disfigurement or the person with the legs severed. She said the committee needed to keep in mind that medical treatment available now can alleviate much of that disfigurement and can, perhaps, provide prostheses for a limb that was severed or any other medical condition that could be described. Those would be actual damages under future medical treatment when you are engaging in a lawsuit.

{Tape: 2; Side: B}

SEN. KELLY GEBHARDT addressed a problem he sees with the court system being unable to have a case heard in a reasonable period of time. He asked **SEN. TROPILA** if he would consider an amendment that would strike on line 26 of page 1 "less" and "a, b and c" and then on line 2 of page 2, strike "may" and put "must." **SEN. TROPILA** said he could get back to the committee before executive action was taken.

Closing by Sponsor:

SEN. TROPILA thanked all of the proponents for appearing. He discussed **Mr. Mortenson's** case and his struggle. He continued on to say this is not a lawyer's relief bill, but rather it is a businessman's protection bill. **SEN. TROPILA** pointed out that not everyone drinks at bars. They drink at private parties in homes, cocktail parties, at home, social functions, tailgate parties and at Chamber of Commerce events. However, bars get the bad name for it. They get chastised and are considered second-class citizens because they sell the liquor. Just because they sell the product does not mean that a person has to consume it. **Mr. Mortenson** had a perfectly good case; however, the three-year statute of limitations was what hurt him in his case. Memories eroded; people moved; it just isn't fair. There are 23 states with specific provisions for statute of limitations in their dram shop law. Two are less than a year. Three have one-year statutes of limitations. Thirteen have two-year limitations, the same being proposed in this bill. Four states have three-year statutes of limitations. This bill would not limit in any way actual damages that an innocent party may have. What it does is set a reasonable ceiling on non-economic damages so that punitive or exemplary damages could be capped at \$250. In summary, he said the bill has four features. The drinker cannot sue the bar or social host unless he was coerced to drink or was a minor and the server knew it or should have known it. The jury can consider that the drinker's behavior may have been the approximate cause of the injured party's damages rather than the

server serving him the alcohol. Thirdly, the party alleging injury has two years to file action, and last, you can be awarded all the actual damages you can prove, but there is a \$250K limit on the punitive damages.

HEARING ON SB 331

Sponsor: SENATOR CAROLYN SQUIRES, SD 34, MISSOULA

Proponents: Kevin Braun, Department of Labor and Industry;
Sami Butler, Montana Nurses Association

Opponents: Colleen White, attorney for Montana Department of Corrections

Informational Witnesses: Kim Powell, Board of Nursing

Opening Statement by Sponsor:

SENATOR CAROLYN SQUIRES, SD 34, MISSOULA, was requested by the Board of Nursing to change some language regarding the composition of the board. The Board believes that the practice of nursing should not be defined based on whether or not one receives compensation. They also want to take out the portion that talks about the practice of unlicensed nursing. She discussed being notified late in the process that the Board of Nursing had an issue with nurses in correctional facilities and introduced an amendment requested by them, **EXHIBIT (bus33a04)** (SB033101.aem).

Proponents' Testimony:

Kevin Braun, Department of Labor and Industry, stood as a proponent on behalf of the Board of Nursing for SB 331.

{Tape: 3; Side: A}

He discussed various aspects of the bill and gave information to the committee, such as the gratuitous care of a friend or family member. A major provision regarding this bill deals with unprofessional versus unlicensed practice. The unprofessional issues revolve around whether a nurse has allowed her license to lapse. He discussed the amendment, which would strip the part that deals with correctional facilities or institutions and would allow an LPN to serve as a charge nurse. The Board of Nursing had agreed to the amendment. He said they will be looking at the situation over the next couple of years to address the situation in the next legislative session.

Sami Butler, Montana Nurses Association, said she rose in support of the bill as amended. They believed that SB 331 would make appropriate changes to nursing statutes. They believed a person who holds him/herself out to the public as a nurse should have a license. The bill also clarified penalties between a nurse who has allowed a nursing license to lapse versus a person who never obtained the education and licensing necessary for nursing. They consider practicing nursing with a lapsed license is unprofessional; however, it's not the same level of infraction or safety risk as never having been successfully licensed. She then spoke to the amendments. She referred to page 2, line 8's current language which allows an LPN to be in a charge nurse capacity in a long term care facility that provides skilled or intermediate nursing care as defined in statute. That week, she began hearing from correctional facility nurses, both LPN and RN. They thought it was a problem due to the difference between the population in a long term care facility is stable as opposed to the population in a correctional facility and the myriad of different types of care needed.

Opponents' Testimony:

Colleen White, attorney for Montana Department of Corrections, stood in support of everything in the bill except taking out the language regarding nurses in correctional facility settings, which she opposed. She gave a history of the proposed language to allow LPN's to work under the general supervision of RN's in a correctional facility treating non-acute patients. She said it stemmed from a survey conducted by the Department of Public Health and Human Services in September, 2001. During that survey, the RN surveyors noticed that the prisons were not scheduling RN's on every shift. When it was brought to the attention of management, they pulled out a rule from the Department of Health and Human Services that said an RN may serve as a charge nurse on the day shifts and LPN's may serve in an infirmary as the charge nurse during evening and night shifts. That rule did not comport with the Board of Nursing rule on supervision, which required RN supervision 24 hours. Any time an LPN worked within the scope of practice, an RN had to be in sight, on premises, supervising that work. When the Board of Nursing looked at the issue, the board members commented that this setting of an infirmary where they take care of inmates on a 24-hour basis, why didn't the same exemption that exists for long-term care facilities apply at the correctional facilities. She then discussed the acuity of care of these prisoners. She stated the Department of Corrections would continue to work with the Board of Nursing to define a solution.

Informational Witness Testimony: **Kim Powell, Board of Nursing,** shared that the issue of licensure. Two cases of imposter nurses rose in Montana this year and it puts the public at great risk. The Department of Corrections issue came to the attention of the Board of Nursing when the Department of Public Health and Human Services rule came in conflict with the Board of Nursing rules. She explained that the infirmary at a prison does not deal with acute health issues, so they felt comfortable going forward with SB 331. She felt there should be ongoing discussion

Questions from Committee Members and Responses:

SEN. MIKE SPRAGUE commented that earlier we had some bills that talked about lapsing versus expiring. He asked **Mr. Braun** to address it. **Mr. Braun** referred to national reporting requirements associated with physicians and the ability to report those licenses as merely being lapsed as opposed to being suspending because of disciplinary action.

SEN. DON RYAN asked **Ms. White** if the correctional institutions have a problem with funding for registered nurses and wanted her to address the liability issue. **Ms. White** replied that the staffing patterns were a result of the inability to attract and retain both RN's and LPN's. She couldn't speak to the overall nursing shortage, but said the problem is exacerbated at the correctional facilities.

SEN. SHERM ANDERSON asked **SEN. SQUIRES** about compliance and Subsection C. His question to her was if there is some sort of fiscal impact. **SEN. SQUIRES** did not believe there was any.

{Tape: 3; Side: B}

SEN. ANDERSON said he was getting the idea from **SEN. SQUIRES'** testimony that when they found they were in non-compliance, he didn't know if that meant they needed additional RN's. **Ms. White** answered it required increasing the wages to attract more applicants as well as the hiring of additional staff. What they have at Montana State Prison is an infirmary that handles the most sick of the patients. They have asked their outlying detention facilities to transport the sicker inmates there. With Section C in the bill, she believed that the cost may increase for some facilities that are not operating right now with 24-hour, 7-day per week RN's. She felt some of the correctional facilities are now working more like a long-term care facility in their LPN supervision.

SEN. SPRAGUE came at the same question from a liability standpoint with concerns that an inmate might take advantage of

the system and sue. He asked **Ms. White** if his suspicions were correct. She had not seen any tort claims come through and thought it was more a matter of being in compliance with the law.

Closing by Sponsor:

SEN. SQUIRES discussed the procedure for renewing a nursing license and said, in the past, if you did not complete the process, you did not practice nursing. She understood some of the problems facing nurses, not only in the Montana State Prison system, but in other health care facilities.

EXECUTIVE ACTION ON SB 235

Motion/Vote: SEN. ANDERSON moved that SB 235 BE ADOPTED AS AMENDED, **EXHIBIT**(bus33a05) (SB023501.aem). Motion carried 9-1 with SQUIRES voting no.

ADJOURNMENT

Adjournment: 11:58 A.M.

SEN. DALE MAHLUM, Chairman

SHERRIE HANDEL, Secretary

DM/SH

EXHIBIT (bus33aad)